



DAN MORALES  
ATTORNEY GENERAL

Office of the Attorney General  
State of Texas

April 17, 1991

Mr. Paul G. Stuckle  
Assistant City Attorney  
Fort Worth Police Department  
350 W. Belknap St.  
Fort Worth, Texas 76102

OR91-194

Dear Mr. Stuckle:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 6143.

The city of Fort Worth received a written request for access to the official files of the Fort Worth Police Department relating to the shooting deaths of two individuals on a campus of Tarrant County Junior College, including police investigative reports, photographs, evidence, and medical reports. You submitted for our inspection 37 exhibits containing information you believe is responsive to the requestor's inquiry. You contend that different portions of the requested information are excepted from required public disclosure by sections 3(a)(1), 3(a)(3), 3(a)(8), and 3(a)(11) of the Open Records Act.

Section 3(a)(1) excepts "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." Prior decisions of this office have held that information may be deemed confidential pursuant to the informer's privilege as incorporated into section 3(a)(1). You argue that the privilege authorizes the withholding of the statements, affidavits, depositions, and interviews of witnesses and informants.

Two of the acknowledged purposes of the informer's privilege are to encourage citizens to communicate information to law enforcement authorities regarding the commission of serious crimes and to protect such communicants from threats of retaliation. *See* Open Records Decision Nos. 515 (1988); 208 (1975). You allege that these considerations warrant the nondisclosure of the witness statements, but you have not shown that specific witnesses have been exposed to threats of retaliation or harm in this instance. Nor have you demonstrated that any witness will be discouraged from cooperating with law enforcement in the future by

the disclosure of this information. Consequently, we are not convinced that their statements should be withheld pursuant to section 3(a)(1) as information protected by the informer's privilege.

You also contend that some of the requested information is excepted by section 3(a)(3) of the Open Records Act. This provision excepts

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

The test under section 3(a)(3) is whether litigation involving a governmental entity, its officers, or its employees is pending or reasonably anticipated in the matter that is the subject of the requested information. See Heard v. Houston Post Co., 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.).

Your claim is based on the fact that the requestor is an attorney employed by the family of one of the deceased. You have furnished no evidence, however, which shows that litigation is realistically contemplated in this matter. Consequently, we conclude that the none of the information is excepted from disclosure by section 3(a)(3).

You next raise section 3(a)(8) as an exception to the disclosure of some of the requested information. Section 3(a)(8) excepts

records of law enforcement agencies and prosecutors that deal with the detection, investigation, and prosecution of crime and the internal records and notations of such law enforcement agencies and prosecutors which are maintained for internal use in matters relating to law enforcement and prosecution.

The test for determining whether information is excepted under this provision is whether its release will unduly interfere with law enforcement and crime prevention. See Ex parte Pruitt, 551 S.W.2d 706 (Tex. 1977). You ask whether the statements

and identities of witnesses and contacts, both civilians and police officers, may be withheld from disclosure.

Section 3(a)(8) was construed in Houston Chronicle Publishing Co. v. City of Houston, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). There the court held that certain information appearing in police department records could be withheld from public disclosure, including much of the information at issue in this request. See Open Records Decision No. 127 (1976). Yet, it remains the duty of the governmental body to establish that law enforcement and crime prevention will unduly be interfered with before section 3(a)(8) will operate to shield information from public disclosure. This office will not supply the connection between the release of the information and the anticipated interference with law enforcement or crime prevention unless this fact clearly appears from the face of the requested information.

You analogize the present circumstances to Open Records Decision No. 333 (1982), which determined that a police department was not required to reveal the identities of its "contacts." Unlike that decision, however, we are not here dealing with informants who supply law enforcement agencies with information on a regular basis and whose anonymity is critical to the safety of the informants, the conduct of ongoing criminal investigations, and the prompt and effective detection of future crimes. Rather, we are presented here with witnesses to a single incident and with officers whose duty it is to investigate and report such incidents. Moreover, you have not adequately set forth facts that demonstrate that release of the identities and statements of witnesses and police officers will otherwise unduly interfere with law enforcement and crime prevention, and such facts do not clearly appear from the face of the information. Accordingly, we do not believe this information is excepted by section 3(a)(8) on this occasion.

Finally, you raise section 3(a)(11) as an exception to the disclosure of some of the requested information. That section excepts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency." The exception is designed to encourage open and frank discussion within an agency or between agencies on matters of policy arising in connection with the decision-making process. See Austin v. City of San Antonio, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, *writ ref'd n.r.e.*). It therefore will protect advice, opinion, or recommendation that is used in the deliberative process. See Open Records Decision Nos. 565 (1990); 450 (1986). Section 3(a)(11) will not, however, protect purely factual information. *Id.*

Upon review of the exhibits for which section 3(a)(11) was claimed, we conclude that none of the information contained in those exhibits reflects advice, opinion, or recommendation. All of the information in the exhibits are either statements of statistical, scientific, or objective fact. Exhibit 13B contains two series of statements that might be viewed as expressions of opinion, but we believe they reflect the writer's objective determination that certain evidence displays particular physical characteristics. Thus, we do not believe they can be characterized as opinion.

We have considered the exceptions you claimed, and have determined that none of them will protect the information at issue. For this reason, you must release the requested information. Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR91-194.

Yours very truly,

A handwritten signature in black ink, appearing to read "Steve Aragon", with a stylized flourish at the end.

Steve Aragon  
Assistant Attorney General  
Opinion Committee

SA/lb

Ref.: ID Nos. 5729, 6143, 6577